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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

MEGAN OVICK, et al.,

Plaintiffs and Appellants,

v.

NATIONAL SEMICONDUCTOR
CORPORATION,

Defendant and Respondent.

H038108

(Santa Clara County

Super. Ct. No. 110CV178254)

In this case, we consider questions regarding the statute of limitations for and delayed discovery of pre-birth injuries that were allegedly due to exposure to toxic and hazardous materials more than 20 years ago. Plaintiffs Marla Ovick and Michael Ovick both worked for defendant National Semiconductor Corporation (NSC) for a number of years. They allege that their daughter, plaintiff Megan Ovick, developed retinoblastoma (a cancer of the eye) as a result of parental and *in utero* exposure to toxic chemicals at NSC. (For clarity, and meaning no disrespect, we will hereafter refer to the members of the Ovick family by their first names. We will refer to all three of them collectively as “the Ovicks” or “Plaintiffs”; sometimes, we will refer to Marla and Michael jointly as “Parents.”) The Ovicks allege that Parents did not know their workplace chemical exposure caused Megan’s retinoblastoma until March 2009 when Parents’ former coworkers, Debbie and Michael Studendorff—whose son also has retinoblastoma—told

the Ovicks that their attorneys were investigating claims of birth defects that were allegedly due to exposure to toxic and hazardous substances in the semiconductor industry.

Plaintiffs appeal from a judgment of dismissal after the trial court sustained NSC's demurrer to their third amended complaint without leave to amend on the ground that the action was barred by the limitations period in Code of Civil Procedure section 340.4. (Unless otherwise stated, all further statutory references are to the Code of Civil Procedure.) Plaintiffs contend the applicable statute of limitations is section 340.8, the two-year limitations period for causes of action based on exposure to hazardous chemicals (which is subject to tolling for minority and insanity), and that the trial court erred when it applied the six-year limitations period for causes of action based on pre-birth injuries in section 340.4 (which is not subject to such tolling). They also argue that: (1) the court erred when it concluded that they were not entitled to rely on the discovery rule to toll the statute of limitations; and (2) NSC is equitably estopped from relying on a statute of limitations defense because it knew the chemicals used in the workplace caused reproductive harm and fraudulently concealed the causal connection between plaintiffs' chemical exposure and their injuries.

NSC contends that Megan's claims are barred because they are untimely under the discovery rule. NSC also contends that Parents' emotional distress claims are untimely, and that Parents' claims are barred by the exclusive remedy provision of the workers' compensation law.

We hold that the Ovicks have pleaded sufficient facts to demonstrate that they are entitled to rely on the discovery rule to delay the accrual of Megan's causes of action until March 2009. In light of this delayed accrual, Megan's causes of action are timely under both section 340.4 (and its predecessor, former Civil Code section 29) and section 340.8. However, although Parents may also rely on the discovery rule to delay accrual of their causes of action for negligent and intentional infliction of emotional distress, those

claims are barred by the exclusive remedy provisions of the workers' compensation law. Accordingly, we will reverse the judgment and remand to the trial court with directions to vacate its previous order and enter a new order overruling the demurrers to Megan's causes of action and sustaining the demurrers to Marla and Michael's claims.

FACTS¹

Both Marla and Michael worked for NSC at its Santa Clara manufacturing facility, in clean rooms and elsewhere, where they used and were exposed to hazardous chemicals. Marla worked there from 1976 until 1991; she worked in clean rooms from 1980 to 1986. Michael worked for NSC from 1980 until 1999. Megan was born on August 22, 1990; she was 19 years old when the original complaint was filed in February 2010.

NSC "required its workers to use numerous chemicals that are known to be hazardous, teratogenic,^[2] genotoxic^[3] and reproductively toxic" to assemble and to manufacture NSC's products. "These chemicals are known to cause severe harm to unborn children."

Marla "was 'present' in 'clean rooms' and elsewhere" in NSC's facility while she was pregnant with Megan. Megan was exposed *in utero*, "during the crucial months of

¹ In reviewing the propriety of the trial court's order sustaining NSC's demurrer, we accept as true all factual allegations properly pleaded in the complaint. (*Gu v. BMW of North America, LLC* (2005) 132 Cal.App.4th 195, 200.) Accordingly, our summary of the facts is drawn from the material allegations of the operative pleading, the third amended complaint. (*Ibid.*) And since a demurrer admits the truth of all facts properly pleaded, we will refer to the allegations of the third amended complaint without sometimes using the prefatory phrase "plaintiffs allege," to avoid undue repetition of the phrase.

² "Teratogenic" means "tending to cause developmental malformations" (Webster's 3d New Internat. Dict. (1993) p. 2358, col. 1.)

³ "Genotoxic" means "[d]enoting a substance that by damaging DNA may cause mutation or cancer." (PDR Medical Dictionary (2d ed. 2000) p. 739, col. 1.)

growth in her mother's womb, for prolonged periods of time to . . . reproductively toxic chemicals and processes." Michael also worked in clean rooms, where he was exposed to hazardous chemicals for prolonged periods of time. Parents absorbed the workplace chemicals into their bodies through their skin and by inhalation.

"Upon information and belief," the third amended complaint lists chemicals or classes of chemicals Parents were exposed to and specifies how NSC used some of those chemicals. Each of these chemicals "was a substantial factor in causing retinoblastoma, a pediatric cancer affecting the eye, in Megan." Plaintiffs allege that NSC did not provide Parents "any effective warning, advice or protection against these" hazardous chemicals; that NSC failed to warn its employees of the toxic nature of these substances; that the ventilation system and protective clothing NSC provided were ineffective; and that Parents reasonably relied on NSC to have superior knowledge of the potential hazards in the workplace.

The third amended complaint alleges that NSC "knew or should have known of the hazardous nature of the . . . chemicals and processes used in the 'clean rooms' " and should have foreseen or anticipated that NSC workers would be exposed to those chemicals. NSC "concealed and/or misrepresented" and "failed to warn . . . its employees" of the toxic nature of the chemicals used to manufacture NSC's products. Parents "reasonably and justifiably relied on their employer" "to appropriately warn, advise and/or implement safety policies and procedures" pertaining to chemicals in the workplace and as a "direct and proximate result of [NSC's] concealment of and failure to warn," they "were prevented from discovering the cause of [Megan's] retinoblastoma and other injuries."

Megan was diagnosed with retinoblastoma "in or about May 1992" (about 21 months after her birth). After that, Parents spoke with Megan's "treating physicians, surgeons and other specialists" regarding the cause of Megan's condition "continuously throughout the course of her medical treatment." "At no time prior to March 2009, did

any” of the medical professionals treating Megan “ever inform, advise, suggest or otherwise imply that parental occupational exposure was a potential contributing cause” of Megan’s injuries and birth defects. Specifically, Parents asked Dr. Peter Egbert, Megan’s ophthalmologist at Lucille Packard Children’s Hospital, what caused Megan’s retinoblastoma, and he said he did not know. Parents told Dr. Egbert where they worked, but at no time did he indicate that occupational exposure to hazardous or toxic chemicals caused Megan’s retinoblastoma. Parents wanted to know what caused Megan’s cancer because they were concerned that any children they had in the future might have a higher risk of developing retinoblastoma. “Dr. Egbert repeatedly stated that he could not pinpoint a cause of [Megan’s] cancer.” Megan’s other doctors said “they were unsure of the cause” and counseled parents to undergo genetic testing. Parents reasonably relied on the advice of Megan’s medical providers and had “no reason to investigate, inquire into or suspect any occupational cause of these injuries.”

In or after March 2009, almost 17 years after Megan was diagnosed with retinoblastoma, Parents learned from their former coworkers, Debbie and Michael Studendorff, “that attorneys were investigating cases of birth defects caused by chemical exposures in the semiconductor industry.” Parents retained these attorneys to investigate whether Megan’s retinoblastoma “was caused by parental occupational exposure” to toxic chemicals at NSC. Through that investigation, “they learned for the first time, in or after March 2009,” that: “(a) manufacturing chemicals at NSC were reproductively toxic; (b) their exposure levels were sufficiently high to cause reproductive harm including birth defects . . . ; and (c) [Megan’s] retinoblastoma was caused by chemical exposures” at NSC. Parents did not suspect any of these facts prior to retaining counsel and could not, through the exercise of reasonable diligence, have discovered the cause of Megan’s injuries any time before March 2009.

NSC was a founding member of the Semiconductor Industry Association (SIA) and participated in the Semiconductor Safety Association (SESHA). SIA provided

advice and assistance to member companies on regulatory and legislative matters, as well as workplace health and safety. NSC personnel were officers of SIA and served on its occupational health committee. On its own, and through SIA, NSC concealed and misrepresented the hazardous nature of the chemicals in its workplace from its employees.

Before 1982, NSC knew that glycol ethers, which were rapidly absorbed through the skin, caused reproductive harm. In or before 1982, SIA told NSC that animal studies revealed that the chemicals used in the semiconductor industry caused birth defects. And in and before 1987, a SESA journal advised NSC that: (1) at least 15 chemicals used in the semiconductor manufacturing process were known to cause birth defects in humans; (2) at least 18 chemicals used in the semiconductor manufacturing process were known to cause birth defects in animals; (2) extreme caution should be use with these chemicals; and (3) employers should discuss known risks of reproductive harm with their female workers so workers can decide whether to become pregnant while exposed to these agents. By 1987, NSC knew that an epidemiologic study of Digital Equipment Corporation (DEC) workers documented an increased risk of miscarriage among fabrication workers in the semiconductor industry.

The following facts were alleged to demonstrate concealment: (1) statements by the SIA in a 1980 newspaper article, in a 1987 white paper, and in testimony before Congress in 1989 that the semiconductor industry was safe; and (2) similar comments about the safety of the industry by NSC employees in an article in the San Francisco Chronicle in December 2000 and in a trade newspaper in November 2003. NSC and the SIA “have repeatedly and intentionally failed and refused to conduct, participate in, or cooperate in . . . any scientific study regarding the incidence of birth defects, developmental damage, or . . . congenital harm among the offspring of chemically-exposed semiconductor workers.” Although NSC knew semiconductor manufacturing chemicals caused reproductive harm, it failed to disclose the dangers to its workers,

including Parents. NSC expressly and impliedly represented to Parents and other employees that the chemicals in their workplace were not a health hazard to them or their unborn children and were not the cause of Megan's injuries, with the intent that Parents would rely on these representations; Parents, in fact, "reasonably relied upon said representations."

The third amended complaint describes an SIA-funded study done by the University of California at Davis (U.C. Davis) in the late 1980's relating to miscarriages and fertility in the semiconductor industry, as well as a "script" developed by the SIA for sharing the study's results with industry workers. Plaintiffs alleged misrepresentation and concealment because that SIA-funded study did not explore birth defects and developmental damage (as opposed to miscarriages and fertility) and because the "script affirmatively advised employees that semiconductor fabs were 'a safe place for women of child-bearing age to work' " in terms of miscarriage rates. Because employee "debriefing sessions" by the industry "took great pains to avoid and deflect" any discussion of birth defects, they left the impression that miscarriages, but not birth defects, were a problem. Yet, "by at least 1987," NSC and the SIA "knew of multiple . . . studies involving the reproductive effects of manufacturing chemicals, the results of which were summarized in detail and distributed by the Semiconductor Safety Association." Notwithstanding this knowledge, NSC's 1995 Chemical and Radiation Safety Handbook contained no information pertaining to reproductive harm or pregnancy and NSC's employee hazard training in the 1980's and 1990's was silent regarding the potential for reproductive harm from work in the semiconductor industry. "The semiconductor industry's course of conduct involving non-cooperation and concealment of the true health risks to workers continued throughout the 1990s well after Megan . . . was born."

PROCEDURAL HISTORY

Initial Pleadings and Demurrer to First Amended Complaint

The Ovicks filed their original complaint against NSC on February 22, 2010, in Alameda County Superior Court. In addition to Parents and Megan, the named plaintiffs included Christopher Studendorff (who also had retinoblastoma) and his parents, Debbie and Michael Studendorff (both of whom also worked at NSC). The Studendorffs' claims are the subject of a separate appeal in *Studendorff v. National Semiconductor Corporation* (Sept. 25, 2014, H037739, nonpub. opn.).

In May 2010, the parties stipulated to a change of venue for the action from Alameda County to Santa Clara County and the court ordered the matter transferred.

After NSC demurred to the original complaint, but before the hearing on the demurrer, Plaintiffs filed a first amended complaint. The first amended complaint included causes of action on behalf of Megan for negligence, strict liability, willful misconduct, misrepresentation, premises liability, and products liability. The first amended complaint also included causes of action on behalf of Parents for intentional and negligent infliction of emotional distress.

NSC demurred to the first amended complaint on a variety of grounds, including that it was barred by the statute of limitations. Plaintiffs opposed that demurrer.

In November 2010, the court sustained the demurrer with leave to amend based on the statute of limitations defense. The court found that the action was governed by section 340.4, and its predecessor, Civil Code section 29, both of which are subject to the discovery rule. Citing *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 (*Fox*) and other cases, the court held that "Plaintiffs had failed to *specifically* 'plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.'" (Original italics.) The court overruled the demurrers to Parents' emotional distress claims.

Second Amended Complaint and Demurrer to Second Amended Complaint

Plaintiffs filed their second amended complaint in December 2010. It contained the same causes of action as their first amended complaint.

NSC demurred to the second amended complaint. NSC claimed, among other things, that Megan's claims were barred by section 340.4⁴ and that Plaintiffs had failed to specifically plead facts that warranted application of the discovery rule. Plaintiffs opposed the demurrer, arguing that the applicable statute of limitations was section 340.8, which applies to actions based on exposure to toxic substances, and that the limitations period in section 340.8 was tolled by Megan's minority. They also argued that their claims were timely under both section 340.4 and section 340.8 because they were tolled by the discovery rule.

Ruling on the demurrer, the court affirmed its previous holding that the applicable limitations period is the six-year period in section 340.4 for birth and pre-birth injuries. But the court questioned whether the Ovicks had met their burden to specifically plead facts showing an inability to have made an earlier discovery despite reasonable diligence. The court therefore sustained the demurrer with leave to amend.

Third Amended Complaint and Demurrer Thereto

Plaintiffs filed a third amended complaint (the operative pleading). It contained the same causes of action as previous complaints, except for Megan's misrepresentation claim, which was stricken. It also contained new facts regarding NSC's alleged concealment, including the allegations about the SIA, SESHHA, the U.C. Davis study, the DEC study, NSC's 1995 Handbook, and NSC's statements about the safety of the industry in 2000 (ten years after Megan was born).

⁴ The other grounds for the demurrer were that Plaintiffs had failed to plead misrepresentation with specificity, failed to state a claim for products liability, and failed to identify the specific chemicals that caused their injuries.

NSC demurred to the third amended complaint on statute of limitations grounds only. NSC argued that the Ovicks had not alleged sufficient facts to rebut the presumption that they were aware of the cause of Megan's injuries. NSC also argued that while the Ovicks alleged they told Megan's physicians about their occupations and where they worked, they did not allege that they had conducted a reasonable investigation by asking any physician about their exposure to hazardous chemicals. Moreover, NSC argued that the Ovicks did not allege that any of the studies mentioned in their complaint were unavailable to them; that they read or relied on any of the news reports or articles described in the third amended complaint; that the December 2000 newspaper article Plaintiffs quoted in their complaint reported that former NSC workers were suing NSC for illnesses caused by exposures to alleged hazardous materials; and that nondisclosure by a nonfiduciary does not justify late discovery.

In opposition, Plaintiffs argued that they conducted a reasonable investigation and could not have discovered the cause of Megan's injuries sooner because they reasonably relied on information from Megan's doctors, and that, because of NSC's misrepresentations, they had no reason to suspect wrongdoing by NSC. Plaintiffs admitted that they did not read the scientific studies, journal, or newspaper articles mentioned in the third amended complaint. They argued that publication of the newspaper article in 2000 was insufficient under the law to put them on notice.

The trial court sustained the demurrer to the third amended complaint without leave to amend. Citing *Poosh v. Phillip Morris USA, Inc.* (2011) 51 Cal.4th 788 (*Poosh*), the court stated that Plaintiffs are presumed to know the cause of their injuries and, although they had pleaded the time and manner of discovery, they had failed to allege "specific facts that show the inability to have made earlier discovery despite reasonable diligence." The court concluded that Plaintiffs had not conducted a diligent investigation; found that they were therefore not entitled to rely on the discovery rule to delay accrual of their causes of action; and entered a judgment of dismissal for NSC.

DISCUSSION

I. Standard of Review

We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) “In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*); see also *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1075.) In addition to accepting as true all properly pleaded material facts, we also accept as true those facts that may be implied or inferred from those expressly alleged. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870.)

“It is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he [or she] describes the defendant’s conduct. A demurrer tests only the legal sufficiency of the pleading.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) Thus, as noted, “the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 [court

reviewing propriety of ruling on demurrer is not concerned with the “plaintiff’s ability to prove . . . allegations, or the possible difficulty in making such proof”].)

On appeal, we will affirm a “trial court’s decision to sustain the demurrer [if it] was correct on any theory. [Citation.]” (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, fn. omitted.) Thus, “we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself. [Citations.]” (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.)

II. Statute of Limitations Governing Megan’s Claims

Plaintiffs contend the court erred when it held that the applicable statute of limitations is the six-year limitations period in section 340.4, which applies to personal injury claims based on birth and pre-birth injuries. They assert that the applicable statute of limitations is the two-year period in section 340.8, which applies to injury claims “based upon exposure to a hazardous material or toxic substance.” (§ 340.8) Plaintiffs argue that “[o]n their face,” both section 340.4 and section 340.8 “appear to govern an action for birth or pre-birth injuries caused by exposure to hazardous materials or toxic substances” and that section 340.8, the later-enacted, more specific statute, controls over the earlier-enacted, more general provision in section 340.4.

A. General Principles Regarding Statutes of Limitations

As the Supreme Court explained in *Poosh*, *supra*, 51 Cal.4th 788, a “statute of limitations strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available. Thus, statutes of limitations are not mere technical defenses, allowing wrongdoers to avoid accountability. (*Norgart v. Upjohn Co.* (1999)

21 Cal.4th 383, 395-397 . . . [(*Norgart*)].) Rather, they mark the point where, in the judgment of the Legislature, the equities tip in favor of the defendant (who may be innocent of wrongdoing) and against the plaintiff (who failed to take prompt action): ‘[T]he period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.’ ” (*Pooshs*, at p. 797, quoting *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 463-464.)

“There are several policies underlying such statutes. One purpose is to give defendants reasonable repose, thereby protecting parties from ‘defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps.’ [Citations.] A statute of limitations also stimulates plaintiffs to pursue their claims diligently. [Citations.] A countervailing factor, of course, is the policy favoring disposition of cases on the merits rather than on procedural grounds.” (*Fox, supra*, 35 Cal.4th 797, 806.) Statutes of limitations are “ ‘designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.’ ” (*Adams v. Paul* (1995) 11 Cal.4th 583, 592.) Once the statute of limitations runs, “ ‘the right to be free of stale claims . . . comes to prevail over the right to prosecute them.’ ” (*Ibid.*)

“Critical to applying a statute of limitations is determining the point when the limitations period begins to run. Generally, a plaintiff must file suit within a designated period after the cause of action *accrues*. (. . . § 312.) A cause of action accrues ‘when [it] is complete with all of its elements’—those elements being wrongdoing, harm, and causation.” (*Pooshs, supra*, 51 Cal.4th at p. 797, citing *Norgart, supra*, 21 Cal.4th at p. 397; original italics.)

“The most important exception to [the] general rule regarding accrual of a cause of action is the ‘discovery rule,’ under which accrual is postponed until the plaintiff

‘discovers, or has reason to discover, the cause of action.’ [Citation.] Discovery of the cause of action occurs when the plaintiff ‘has reason . . . to suspect a factual basis’ for the action.”⁵ (*Pooshs, supra*, 51 Cal.4th at p. 797, citing *Norgart, supra*, 21 Cal.4th at pp. 397, 398 and *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111 (*Jolly*).) “ ‘The policy reason behind the discovery rule is to ameliorate a harsh rule that would allow the limitations period for filing suit to expire before a plaintiff has or should have learned of the latent injury and its cause.’ ” (*Pooshs*, at pp. 797-798, quoting *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 531.) When the plaintiff is a minor, it is the knowledge or lack thereof of the parents that determines when the cause of action accrues. (*Young v. Haines* (1986) 41 Cal.3d 883, 890, fn. 4 (*Young*).)

The statutes of limitations at issue in this case are section 340.4 and its antecedent, former Civil Code section 29, (both of which apply to pre-birth and birth injuries) and section 340.8 (which applies to injuries due to exposure to hazardous materials or toxic substances). For clarity and ease of reference, we will sometimes use the parenthetical “(pre-birth injuries)” after references to Civil Code section 29 and section 340.4 and the parenthetical “(toxic exposures)” after references to section 340.8.

B. Former Civil Code Section 29 (Statute of Limitations for Pre-Birth Injuries Before January 1, 1994)

Former Civil Code section 29 provided: “A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor, and the time such minor is under any disability mentioned in Section 352 of the Code of Civil Procedure shall not be excluded in computing the

⁵ The discovery rule is also referred to in the case law and in the parties’ briefs as the “delayed discovery rule.” (See e.g., *Fox, supra*, 35 Cal.4th at p. 803.) For ease of reference, we shall use the term “discovery rule.”

time limited for the commencement of the action.” Section 352, in turn, provides in relevant part: “(a) If a person entitled to bring an action, mentioned in Chapter 3 (commencing with Section 335)^{6]} is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.” Thus, under the plain language of former Civil Code section 29, an action for pre-birth and birth injuries is not tolled by the child’s minority or insanity.

The second clause of Civil Code section 29, which contains the statute of limitations, was added in 1941 and became effective on January 1, 1942. (Stats. 1941, ch. 337, § 1; Cal. Const., art. IV, § 8, subd. (c); *People v. Verba* (2012) 210 Cal.App.4th 991, 997 [“with some exceptions, statutes enacted by the Legislature in one year take effect on January 1 of the following year”].) Former Civil Code section 29 was subject to the discovery rule. (*Young, supra*, 41 Cal.3d at pp. 892-893.) It was never amended after 1941 and was repealed in 1993. (Stats. 1993, ch. 219, § 2; see Historical and Statutory Notes, 6 West’s Ann. Civil Code (2006 ed.) foll. § 29, p. 90.)

C. Section 340.4 (Statute of Limitations for Pre-Birth Injuries On or After January 1, 1994)

Section 340.4 provides: “An action by or on behalf of a minor for personal injuries sustained before or in the course of his or her birth must be commenced within six years after the date of birth, and the time the minor is under any disability mentioned in Section 352 shall not be excluded in computing the time limited for the commencement of the action.”

⁶ The reference to “Chapter 3” in section 352 is to chapter 3 (civil actions other than for the recovery of real property) of title 2 (the time of commencing civil actions) of part 2 (civil actions) of the Code of Civil Procedure. Chapter 3 includes sections 335 through 349³/₄.

Section 340.4 was enacted in 1992; it became operative on January 1, 1994. (Stats. 1992, ch. 163 §§ 16, 161.) Section 340.4 contains language very similar to that of the second clause of former Civil Code section 29. (Stats. 1941, ch. 337, § 1.) Section 340.4 is “ ‘but a continuation of’ ” the second clause of former Civil Code section 29. (*In re White* (2008) 163 Cal.App.4th 1576, 1582, citing *Sekt v. Justice’s Court* (1945) 26 Cal.2d 297, 306.) Like its predecessor, under the plain language of section 340.4, an action for personal injuries sustained before or at the time of birth is not tolled by the child’s minority or insanity, but the limitations period is subject to the discovery rule. (*Young, supra*, 41 Cal.3d at pp. 892-893 [former Civil Code section 29].).

D. Section 340.8 (Statute of Limitations for Exposure to Toxic Substances)

Section 340.8 provides in relevant part: “(a) In any civil action for injury or illness based upon exposure to a hazardous material or toxic substance, the time for commencement of the action shall be no later than either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later. [¶] [¶] (c) For purposes of this section: [¶] (1) A ‘civil action for injury or illness based upon exposure to a hazardous material or toxic substance’ does not include an action subject to Section 340.2 [(limitations period for actions based upon exposure to asbestos)] or 340.5 [(limitations period for actions based on professional negligence of a health care provider)]. [¶] (2) Media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another. [¶] (d) Nothing in this section shall be construed to limit,

abrogate, or change the law in effect on the effective date of this section with respect to actions not based upon exposure to a hazardous material or toxic substance.”

Section 340.8, signed into law by the Governor on October 12, 2003, became effective on January 1, 2004. (Stats. 2003, ch. 873, p. 6398; Cal. Const., art. IV, § 8, subd. (c).)

E. Section 352 Tolling for Minority and Insanity Applies to Section 340.8

Unlike section 340.4 and former Civil Code section 29, which expressly state that section 352 tolling for minority and insanity does not apply to actions for pre-birth and birth injuries, section 340.8 is silent regarding section 352 tolling. By its own terms, section 352 applies only to civil actions that are mentioned in chapter 3 of title 2 of part 2 of the Code of Civil Procedure (§§ 335 through 349^{3/4}). Since section 340.8 is in chapter 3 and section 340.8 does not expressly exclude section 352 tolling, the tolling provision in section 352 for minority and insanity applies to section 340.8.

In summary, the six-year limitations period in former Civil Code section 29 governed pre-birth and birth injuries from 1942 through its repeal on December 31, 1993. In 1992, the Legislature updated the language of the limitations provision in former Civil Code section 29 and moved it from the Civil Code to the Code of Civil Procedure when it enacted section 340.4, without making any substantive change. Section 340.4 (pre-birth injuries) became operative on January 1, 1994. In 2003, the Legislature added section 340.8, the statute of limitations for causes of action based on exposure to hazardous materials and toxic substances, effective January 1, 2004.

F. Analysis

The operative pleading alleges three possible accrual dates: (1) August 22, 1990 (Megan’s date of birth); (2) May 1992 (when Megan was diagnosed with retinoblastoma); and (3) March 2009 (when Parents learned about the birth defects

lawsuits against the semiconductor industry from the Studendorffs). We will examine each of these accrual dates as they relate to the limitations periods in sections 340.4 and 340.8 to determine whether there are any possible analyses under which Plaintiffs claims may be timely.

1. Assuming accrual on Megan's birth date (August 22, 1990), her claims were time-barred

When Megan was born on August 22, 1990, the limitations period in former Civil Code section 29 governed actions for pre-birth injuries. Under that section, Megan was required to bring her claims for pre-birth injuries no later than six years from her date of birth or by August 22, 1996. This limitations period was not tolled by her minority. Thus, assuming Megan's claims accrued on her date of birth, the original complaint, filed on February 22, 2010, was untimely by more than 13 years.

2. Assuming delayed accrual until Megan's diagnosis in May 1992, Megan's claims were time-barred under section 340.4

Assuming delayed accrual and that Megan's causes of action accrued when she was diagnosed with retinoblastoma in May 1992, Civil Code section 29 still applied. Under Civil Code section 29—and later section 340.4—Megan was required to file suit within six years of discovery or no later than May 1998. Under this analysis, her complaint, filed in February 2010, was untimely by more than 11 years.

3. Assuming delayed accrual until March 2009 when Parents learned about the birth defects lawsuits, Megan's claims were timely under both sections 340.4 and 340.8

Assuming delayed accrual under the discovery rule and that Megan's causes of action accrued in March 2009 when Parents learned about the birth defects lawsuits against the semiconductor industry from the Studendorffs (17 years after Megan was diagnosed), the applicable statute of limitations for pre-birth injuries was section 340.4.

Under section 340.4, Megan was required to file suit within six years of discovery or no later than March 2015. But by March 2009, section 340.8 (toxic exposures) was also operative. Under section 340.8, Megan was required to file suit within two years of discovery, or no later than March 2011. If the accrual of Megan's causes of action was delayed until March 2009, then her complaint, filed in February 2010, was timely under both section 340.4 (pre-birth injuries) and section 340.8 (toxic exposures), without having to consider tolling for minority.

Plaintiffs assert that because section 340.8 (toxic exposures) "did not become operative until January 1, 2004, it will apply to Megan's cause[s] of action only if [they were] not already time-barred under section 340.4 when section 340.8 became operative." We agree. "Statutes generally operate only prospectively, and '[a] new statute that enlarges a statutory limitations period [only] applies to actions that are not already barred by the original limitations period at the time the new statute goes into effect.' " (*Andonagui v. May Dept. Stores Co.* (2005) 128 Cal.App.4th 435, 440.) This rule applies to section 340.8 since it does not have a provision that makes it expressly retroactive. Therefore, section 340.8 applies only if Megan's claims were not already time barred on its effective date, January 1, 2004. Assuming Megan's causes of action accrued either when she was born on August 22, 1990, or when she was diagnosed in May 1992, under Civil Code section 29 and section 340.4, she was required to bring suit no later than May 1998. Assuming accrual no later than May 1992, Megan's claims were already time barred when section 340.8 went into effect, and the only way her claims survive is if she has adequately pleaded delayed accrual until March 2009 under the discovery rule. Since resolution of the statute of limitations issue turns on the question whether Plaintiffs have adequately pleaded that their causes of action did not accrue until March 2009 under the discovery rule, we need not resolve the question whether Megan's claims are subject to section 340.4 or section 340.8.

III. Delayed Accrual Under the Discovery Rule

A. Legal Principles

“The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her [or his] injury and its negligent cause. [Citation.] A plaintiff is held to her [or his] actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her [or him].” (*Jolly, supra*, 44 Cal.3d at p. 1109, footnote omitted.) “Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her [or his] injury was caused by wrongdoing, that someone has done something wrong to [the plaintiff].” (*Id.* at p. 1110.) In other words, “the limitations period begins once the plaintiff ‘has notice or information of circumstances to put a reasonable person *on inquiry.*’ ” (*Id.* at pp. 1110-1111, original italics, internal quotations omitted.) “A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [the plaintiff] must decide whether to file suit or sit on her [or his] rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [the plaintiff] cannot wait for the facts to find her [or him].” (*Id.* at p. 1111 [action filed in 1981 barred by one-year statute of limitations because plaintiff suspected in 1978 that she had been injured by a defective drug and wanted to file a claim at that time].)

Jolly “sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins the limitations period.” (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391, citing *Jolly*, at p. 1110.)

“ ‘Resolution of the statute of limitations issue is normally a question of fact.’ (*Fox, supra*, 35 Cal.4th at p. 810.) . . . As our state’s high court has observed: ‘There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. [Citation.] It is a question for the trier of fact.’ [Citation.] ‘However, whenever reasonable minds can draw only one conclusion from the evidence, the question becomes one of law.’ [Citation.] Thus, when an appeal is taken from a judgment of dismissal following the sustention of a demurrer, ‘the issue is whether the trial court could determine as a matter of law that failure to discover was due to failure to investigate or to act without diligence.’ ” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320 (*E-Fab*); *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 175 [“[T]he question of when ‘a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule . . . ’ [may] be decided as a matter of law . . . ” only “if the undisputed facts do not leave any room for reasonable differences of opinion”].)

“[B]y discussing the discovery rule in terms of a plaintiff’s suspicion of ‘elements’ of a cause of action, [the Supreme Court] was referring to the ‘generic’ elements of wrongdoing, causation, and harm.” (*Fox, supra*, 35 Cal.4th at p. 807, citing *Norgart, supra*, 21 Cal.4th at p. 397.) “In so using the term ‘elements,’ [the Supreme Court did] not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, [courts] look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.” (*Fox*, at p. 807.) “The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ‘ “ ‘information of circumstances to put [them] on inquiry’ ” ’ or if they have ‘ “ ‘the opportunity to obtain

knowledge from sources open to [their] investigation.’ ” ’ [Citations.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.” (*Id.* at p. 807-808.) In this context, “injury” means both a person’s physical condition and its negligent cause. (*Id.* at p. 808, fn. 2.) “Thus, physical injury alone is often insufficient to trigger the statute of limitations.” (*Ibid.*)

“Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this inquiry duty arises when the plaintiff becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. (*Fox, supra*, 35 Cal.4th at p. 808 [‘to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes . . .’].) If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether ‘such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.’ (*Fox, . . .* at pp. 808-809.)” (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251.)

To rely on the discovery rule, “ ‘[a] plaintiff whose complaint shows on its face that [the] claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.’ [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to ‘show diligence’; ‘conclusory allegations will not withstand demurrer.’ ” (*Fox, supra*, 35 Cal.4th at p. 808.)

The California Supreme Court’s application of the discovery rule in *Jolly* is instructive. The plaintiff in *Jolly* sued several drug companies that manufactured the drug estrogen diethylstilbestrol (DES) for personal injuries she sustained as a result of her mother’s ingestion of DES while the plaintiff was *in utero*. (*Jolly, supra*, 44 Cal.3d at pp. 1107-1108.) Several companies manufactured the drug and Jolly was unable to determine which company manufactured the DES her mother took. But “[a]t least as of 1978, [she] was aware of the pendency of one or more DES suits alleging that DES manufacturers were liable to those injured” (*Id.* at p. 1108.) Jolly filed her complaint in early 1981, almost a year after the California Supreme Court held that a plaintiff who could not identify the manufacturer of the ingested DES could state a cause of action against the manufacturers of a substantial percentage of the market share of the drug. (*Ibid.*, citing *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588.) The parties had agreed that the case was subject to the one-year statute of limitations for personal injuries in former section 340, subdivision (3). (*Jolly*, at pp. 1108-1109.) Applying the discovery rule, the court held that Jolly’s claims were time barred since Jolly had “stated that as early as 1978 she was interested in ‘obtaining more information’ about DES because she wanted to ‘make a claim’; she felt that someone had done something wrong to her concerning DES, that it was a defective drug and that she should be compensated. . . . Thus, plaintiff is held to her admission; she suspected that defendants’ conduct was wrongful during 1978—well over a year before she filed suit. This suspicion would not have been allayed by any investigation. To the contrary, a timely investigation would have disclosed numerous articles concerning DES and many DES suits filed throughout the country alleging wrongdoing.” (*Jolly, supra*, 44 Cal.3d at pp. 1112-1113; see also *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868 [early suspicion that former spouse had concealed true worth of his assets upon dissolution put plaintiff on inquiry notice of potential wrongdoing]; *Norgart, supra*, 21 Cal.4th at p. 390 [plaintiff in wrongful death action, who suspected something wrong had caused his daughter’s death and undertook

an investigation, had reason to discover possible connection to defendant by mid-1986; action filed in 1991 was time-barred under one-year statute of limitations].)

More recently, the California Supreme Court has noted that “California law recognizes a general, rebuttable presumption, that plaintiffs have ‘knowledge of the wrongful cause of an injury.’ [Citation.] In order to rebut that presumption, ‘ “[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.” ’ [Citation.]” (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 638 (*Grisham*), quoting *Fox, supra*, 35 Cal.4th at p. 808.) “Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.” (*Fox*, at pp. 808-809.)

B. Analysis

Unlike the plaintiffs in *Jolly*, who suspected wrongful conduct and a causal connection to the defendant but failed to file suit within the applicable limitations period, the Ovicks allege they did not suspect either wrongful conduct by or a causal connection to NSC before March 2009, when the Studendorffs told them their attorneys were investigating cases of birth defects in the semiconductor industry. Although Parents became aware of Megan’s injury when she was diagnosed with retinoblastoma in May

1992, the third amended complaint alleges that they suspected neither wrongdoing nor that Megan’s cancer was caused by exposure to hazardous chemicals at NSC. They asked Dr. Egbert and other medical professionals involved in Megan’s care what caused her retinoblastoma and were told the cause was unknown. Furthermore, Megan’s doctors recommended genetic testing, which suggested that Megan’s cancer was inherited and not that it was due to wrongful conduct by third persons.

In addition, Marla stopped working in the clean rooms in 1986 and stopped working for NSC altogether in 1991. Megan was born in August 1990. Thus, during the time that Marla was pregnant with Megan (late 1989 through August 1990), she no longer worked in clean rooms.⁷ And when Megan was diagnosed in May 1992, Marla no longer worked for NSC. Since Megan was diagnosed with retinoblastoma at the age of 21 months, rather than at or shortly after her birth, the facts pleaded are subject to the

⁷ The third amended complaint alleges that Marla worked for NSC from “approximately 1976 to 1991” and that she worked “in ‘clean rooms’ from 1980 to 1986.” But Plaintiffs also allege that “[a]t all relevant times,” Marla “was employed in ‘clean rooms’ and elsewhere” at NSC where she used or was exposed to toxic chemicals and that while Marla was pregnant, Megan “was ‘present’ in ‘clean rooms’ and elsewhere at” NSC where she was exposed to hazardous chemicals. Since Megan was born in August 1990, we infer that Marla was pregnant with her from late 1989 through August 1990. The allegations of the third amended complaint are therefore inconsistent with regard to whether Marla worked in clean rooms while she was pregnant with Megan. This implicates two separate rules. First, “ ‘A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows that the action may be barred. [Citation.]’ [Citation.]” (*Geneva Towers Ltd. Partnership v. City and County of San Francisco* (2003) 29 Cal.4th 769, 781.) And second, when a complaint contains both general allegations and specific allegations and a conflict or inconsistency exists between those allegations, the specific allegations control over inconsistent general allegations. (*Perez v. Golden Eagle Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235-1236 citing *Skopp v. Weaver* (1976) 16 Cal.3d 432, 437.) Thus, the more specific allegation that Marla worked in clean rooms from 1980 until 1986 would control over the more general allegations that Marla worked in clean rooms and elsewhere at NSC while pregnant with Megan. In light of these rules, for the purpose of our analysis, we will rely on the more specific allegation that Marla worked in clean rooms from 1980 to 1986.

inference that Parents did not recognize her cancer as a birth defect as opposed to an illness of unknown origin. Thus, the allegations of the third amended complaint support the conclusion that Parents did not suspect that wrongdoing by NSC caused Megan's injuries before March 2009.

We also examine whether Plaintiffs have rebutted the presumption that they had knowledge of the alleged wrongful cause of Megan's injuries, applying the two-pronged test from *Fox*, which requires a plaintiff whose complaint shows on its face that the claim would be barred without the benefit of the discovery rule to “ ‘specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.’ ” (*Fox, supra*, 35 Cal.4th at p. 808.) As we have noted, this “places the burden on the plaintiff to ‘show diligence’; ‘conclusory allegations will not withstand demurrer.’ ” (*Ibid.*) Plaintiffs contend they have pleaded adequate facts that satisfy both prongs of this test.

1. Time and Manner of Discovery

“The first prong requires plaintiffs to allege ‘facts showing the time and surrounding circumstances of the discovery of the cause of action upon which they rely.’ [Citation.] ‘The purpose of this requirement is to afford the court a means of determining whether or not the discovery of the asserted [harm] was made within the time alleged, that is, whether plaintiffs actually learned something they did not know before.’ ” (*E-Fab, supra*, 153 Cal.App.4th at p. 1324, quoting *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 563.)

Plaintiffs contend they have adequately pleaded time and manner of discovery because the operative complaint alleges that in March 2009, Parents learned from their former coworkers that certain attorneys were investigating cases of birth defects caused by chemical exposures in the semiconductor industry; that Parents retained counsel who began investigating whether Megan's retinoblastoma was caused by chemical exposure at

NSC; and that through this investigation Parents learned for the first time that Megan’s cancer was caused by harmful chemical exposures at NSC. They allege that at no time prior to retaining counsel did they suspect that Megan’s cancer could be caused by parental or *in utero* exposure to toxic chemicals at NSC and that they “did not discover,” “nor through the exercise of reasonable diligence could [they] have discovered,” these facts “earlier than March 2009.”

Plaintiffs rely on this court’s opinion in *E-Fab, supra*, 153 Cal.App.4th 1308. The plaintiff in *E-Fab*, a corporation, sued an employment agency for negligence, breach of contract, and negligent misrepresentation after Vickie Hunt (an employee referred by the agency) embezzled money from the plaintiff between 1996 and 2003. (*Id.* at pp. 1313-1315.) In support of delayed accrual under the discovery rule, the “plaintiff allege[d] that it ‘did not become aware of, nor did it have any reason to suspect, that Vickie Hunt had prior convictions for theft and welfare fraud and that her academic credentials had not been verified until after her embezzlement became known in November 2003 when Plaintiff was first informed of . . . Hunt’s criminal record by the police. It was at that time that Plaintiff first became aware that . . . Hunt had not been “screened” by [defendant] and that [defendant’s] representations as to her background were false.’ ” (*Id.* at p. 1324.) “Given the specificity of the foregoing allegations, [this court] conclude[d] that the factual circumstances of plaintiff’s discovery of defendant’s wrongdoing [were] sufficiently asserted to meet [the] first pleading requirement of the delayed discovery rule.” (*Ibid.*) The court bolstered its conclusion by comparing the complaint in *E-Fab* with “the insufficient pleadings found in other cases” and observed that the allegations in *E-Fab* showed the plaintiff “ ‘actually learned something [it] did not know before.’ ” (*Id.* at pp. 1324-1325.)

In contrast, as this court noted in *E-Fab*, the complaint in *McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151 (superseded by statute on another ground as stated in *Grisham, supra*, 40 Cal.4th at page 637) was insufficient because it

failed to “disclose the time or manner of discovery by any plaintiff” and offered “only conclusory allegations of [defendant’s] ‘massive cover-up,’ and allegations that plaintiffs discovered that they ‘may have sustained injuries as a result of [defendant’s] wrongs ‘less than one year prior to filing [suit].’ Before that time, they say (without elaboration), they did not suspect any wrongdoing.” (*E-Fab, supra*, 153 Cal.App.4th at p. 1325, citing *McKelvey*, at pp. 160-161, fn. omitted.) The complaint in *Unpingco v. Hong Kong Macau Corp.* (1991) 935 F.2d 1043 (*Unpingco*) was also insufficient. The plaintiffs in that case claimed they did not discover the facts constituting the fraud until 1988, but failed to explain what it was that they discovered in 1988 that finally put them on notice of the alleged fraud. (*E-Fab*, at p. 1325, citing *Unpingco*, at p. 1046.)

Unlike *McKelvey* and *Unpingco*, Plaintiffs in this case specifically allege that they did not discover Megan’s claims until March 2009, when they learned that their attorneys were investigating cases involving birth defects in children whose parents worked in the semiconductor industry, and consulted with those attorneys, who conducted an investigation and determined that they had a claim. Plaintiffs thus satisfy the first prong of the *Fox* test.

2. Inability to Have Made an Earlier Discovery

Plaintiffs argue that the allegations of the third amended complaint are also sufficient to meet the second prong of the *Fox* test (inability to have made an earlier discovery). They contend their complaint demonstrates that Parents “acted with reasonable diligence by consulting with medical providers as to the cause of Megan’s retinoblastoma and that, despite their diligence, they did not discover, or have reason to discover the wrongful cause of her injury until in or after March 2009” and argue that “it cannot be said, as a matter of law, that Plaintiffs were not diligent, that they acted unreasonably, or that a diligent investigation would have resulted in earlier discovery of the wrongful cause of Megan’s injury.” Plaintiffs rely on *Nelson v. Indevus*

Pharmaceuticals, Inc. (2006) 142 Cal.App.4th 1202 (*Nelson*) and *Unruh-Haxton v. Regents of the University of California* (2008) 162 Cal.App.4th 343 (*Unruh-Haxton*) to support their argument.

In *Nelson*, the plaintiff started taking the prescription diet drug Fen-phen in January 1997 and used it for one month. The drug was withdrawn from the market in September 1997 based on evidence linking it to valvular heart disease. (*Nelson, supra*, 142 Cal.App.4th at p. 1204.) After she stopped taking the drug, Nelson suffered from intermittent heart palpitations, fatigue, and dizziness. In June 2002, she saw an attorney's television ad about the Fen-phen litigation. And in September 2002, an echocardiogram confirmed that Nelson had valvular heart disease. She then contacted the attorney she had seen on television and filed a lawsuit in July 2003. (*Ibid.*)

The defendant in *Nelson* moved for summary judgment, arguing that the action was barred by the statute of limitations based on its theory of “ ‘constructive suspicion,’ ” under which the action accrued when the danger of Fen-phen was publicized. (*Nelson, supra*, 142 Cal.App.4th at p. 1204.) The defendant also argued that although it was undisputed that Nelson did not know about the danger of Fen-phen before the spring of 2002, she should have known sooner, when, through newspaper articles, television news reports, and other means, the general public was given information sufficient to arouse suspicion. (*Id.* at p. 1205.) Nelson had testified in deposition that before 2002, no doctor had suggested she get an echocardiogram; she never received notification the drug had been withdrawn from the marketplace; the attorney's television advertisement was the only one she had seen concerning Fen-phen use, lawsuits, or claims; and before she saw the advertisement, it had never occurred to her that she was at risk of injury from diet drugs. (*Id.* at p. 1205, fn. 2.) The trial court granted summary judgment, but the appellate court reversed. The appellate court rejected the defendant's constructive suspicion argument, stating, “ [A] plaintiff's duty to investigate does not begin until the plaintiff actually has a reason to investigate. . . . [¶] The statute of limitations does not

begin to run when some members of the public have a suspicion of wrongdoing, but only '[o]nce *the plaintiff* has a suspicion of wrongdoing.' ” (*Id.* at p. 1206; italics added.)

The *Nelson* court also rejected the defendant’s contention that Nelson’s symptoms were sufficient to give her reason to investigate and to trigger the limitations period. (*Nelson, supra*, 142 Cal.App.4th at p. 1210.) Nelson testified that she had heart palpitations, fatigue, and dizziness in the late 1990’s; she asked her doctors about the symptoms, but they never gave her a diagnosis; she never asked whether those symptoms were related to Fen-phen; and no doctor ever told her those symptoms were related to the drug or to valvular heart disease. (*Id.* at pp. 1210-1211.) The court held that symptoms as “common and nonspecific as those Nelson suffered” should not have caused her, as a matter of law, to have to investigate the possibility that she had been injured by Fen-phen. (*Id.* at p. 1211.) The court also noted that some of her symptoms predated her use of the drug, that she asked her doctors about her symptoms when the defendant was still selling the drug as a safe drug, and that few media reports discussed valvular heart injury. (*Ibid.*)

In *Unruh-Haxton*, eight sets of plaintiffs (seven married couples and one unmarried woman) sued the medical center where they received fertility treatments, as well as the Regents of the University of California (which operated the fertility clinic at the medical center), alleging that clinic doctors had stolen their genetic material. (*Unruh-Haxton, supra*, 162 Cal.App.4th at pp. 349-350.) In 1995, several news sources reported that the doctors had stolen genetic material from *some* clinic patients. The plaintiffs alleged that they were unaware they were potential victims of the clinic’s wrongdoing until after 2000, and that they filed suit within one year of discovering their claims. (*Id.* at p. 349.) After taking judicial notice of 100 news articles and press releases regarding the scandal, the trial court sustained the defendants’ demurrers on statute of limitations grounds, reasoning that the plaintiffs should have had constructive suspicion of

wrongdoing based on the widespread media coverage. (*Id.* at pp. 349, 359.) The appellate court reversed.

Following *Nelson*, the *Unruh-Haxton* court held that the statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only when *the plaintiff* has such a suspicion. (*Unruh-Haxton, supra*, 162 Cal.App.4th at p. 364.) The appellate court also held that the trial court erred when it took judicial notice of the media reports and when it interpreted the widespread media coverage as conclusively refuting the plaintiffs' allegations that "they either (1) did not see or read the media coverage, or (2) saw the publicity, but failed to discover any wrongdoing." (*Id.* at p. 365.) As to those plaintiffs who were unaware of the media coverage, the court held that "because constructive suspicion is not enough to trigger the statute of limitations, the fact the scandal was publicized is irrelevant unless the plaintiff admits to having knowledge of the publicity." (*Ibid.*) As to the remaining plaintiffs who admitted they were aware of the media coverage, the court concluded that they had sufficiently pleaded delayed discovery because their pleadings "alleged in detail the time and manner of their discovery and how they acted with reasonable diligence: (1) their names were never mentioned in the newspaper articles; (2) the Regents possessed all the medical records and publicly promised to notify all potential victims but did not notify these plaintiffs; (3) the doctors and the Fertility Center continually gave false representations regarding the safety of the patients' genetic material; (4) it was later learned the Regents attempted to conceal facts from the patients; and (5) three sets of patients . . . had had contact with the Regents and were led to believe they were not victims." (*Id.* at p. 366, footnote omitted.)

NSC asserts that Plaintiffs fail to allege specific facts showing that (1) they conducted a reasonable investigation of all potential causes of their injury, and (2) they did anything more than wait for the facts to find them. NSC argues, "Knowing that their child was diagnosed with retinoblastoma and that they allegedly were exposed to

chemicals at NSC, and knowing that their physician was uncertain as to the cause of [Megan's] injury, the Ovicks elected to do nothing rather than investigate." NSC contends that Parents were not "excused from conducting an investigation into the cause of their injury because their physician fail[ed] to ferret out another's wrongdoing."

We begin with the premise that physical injury alone is usually insufficient to trigger the statute of limitations. (*Fox, supra*, 35 Cal.4th at p. 808, fn. 2 ["injury" means both a person's physical condition and its negligent cause; "physical injury alone is often insufficient to trigger the statute of limitations"].) Furthermore, "a plaintiff's duty to investigate does not begin until the plaintiff actually has a reason to investigate." (*Unruh-Haxton, supra*, 162 Cal.App.4th at p. 360.) While Parents learned that Megan had cancer in 1992, they did not suspect that Megan's cancer was wrongfully caused by a third party before they spoke with the Studendorffs in March 2009. As we have noted, when Marla was pregnant with Megan, she no longer worked in the clean rooms. Also, Megan's retinoblastoma was not diagnosed until she was almost two years old. And when Megan was diagnosed in May 1992, Marla no longer worked for NSC. When Parents asked Megan's doctor what caused her cancer, he said the cause was unknown. Thus, the allegations of the third amended complaint show that Parents did not suspect Megan's cancer was due to their exposure to hazardous chemicals at work. Instead, they suspected the condition was inheritable and asked Megan's doctor whether they could pass it on to future children and Dr. Egbert recommended Parents undergo genetic testing. Nothing about these facts put Parents on notice that Megan's cancer was wrongfully caused.

NSC claims that while Plaintiffs allege that Parents told Megan's doctor where they worked, "a disclosure that occurs virtually whenever a parent fills out a medical form," they do not allege that they told the doctor about their purported exposure to toxic chemicals or asked whether such exposure could have caused Megan's cancer. NSC argues that merely asking a physician about the cause of an injury and failing to receive a

definitive answer is not a reasonably diligent investigation. “If Plaintiffs only told their physician that they worked at NSC, without also disclosing their purported history of exposure during the pregnancy, the physician would have no basis to assess risk of reproductive damage.” Plaintiffs respond that Parents’ failure to inform Megan’s doctor about their workplace chemical exposures and to ask whether such exposures could have caused her cancer does not establish that they did not conduct a reasonable investigation. They argue that—like the plaintiff in *Nelson*—they conducted a reasonable investigation by consulting with Megan’s doctors. Furthermore, based on the information provided by NSC, they were unaware of the hazardous nature of the chemicals they worked with and had no reason to suspect a connection between Megan’s cancer and their workplace exposures. Since Parents did not actually suspect a causal connection between their workplace chemical exposure and Megan’s cancer, and Marla no longer worked in the clean room when she was pregnant with Megan, we cannot say, as a matter of law, that Parents’ failure to disclose their workplace exposure to hazardous chemicals to Megan’s doctors means they did not diligently investigate the cause of her cancer.

NSC argues that unlike *Nelson*, where an earlier investigation would not have uncovered the wrongful cause of the injury, Plaintiffs do not suggest that they similarly lacked the opportunity to obtain knowledge from sources open to their investigation. NSC asserts that, to the contrary, the third amended complaint alleges that medical and scientific information identifying the dangers of the chemicals to which Parents were exposed was available 20 years before they filed suit. Furthermore, NSC argues, Plaintiffs do not allege that any of these same studies were not available to Parents or that Parents would not have discovered them without a reasonably diligent investigation.

The media reports and studies described in the complaint fall into two general categories: (1) those in which the SIA or NSC represented that the semiconductor industry was safe; and (2) those that indicated that chemicals used in the industry caused

reproductive harm.⁸ The media information in the first category—that the semiconductor industry was safe—would not have put Plaintiffs on notice. As for the second category, constructive suspicion based on widespread media coverage alone is insufficient to put *the plaintiff* on inquiry notice. The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only when *the plaintiff* has such a suspicion. (*Nelson, supra*, 142 Cal.App.4th at p. 1206; *Unruh-Haxton, supra*, 162 Cal.App.4th at p. 364.) As contrasted with the mainstream media coverage in *Nelson* and *Unruh-Haxton*, the material in the second category consists of scientific studies and information provided by SIA and SSHA. These are not the type of materials that are typically disseminated to the public at large. More importantly, Plaintiffs do not allege that they were aware of any of the information in either category.

Quoting *Pooshs, supra*, 51 Cal.4th 788, 797, NSC argues that if the Ovicks are “ ‘permitted to proceed, the ensuing litigation will require [NSC] to defend against possible false allegations concerning long-forgotten events, when important evidence may no longer be available.’ ” NSC asserts, “Over twenty years have elapsed since Megan Ovick was exposed *in utero* to chemicals at [NSC]. Allowing Plaintiffs to sue now would severely prejudice NSC because, among other reasons, it is likely that documentary evidence and witnesses who could rebut Plaintiffs’ version of events are now unavailable. Plaintiffs had six years from [Megan’s] birth to file claims against NSC, but they failed to do so.” (Internal quotations and citations omitted.)

⁸ The first category includes a 1980 newspaper article, a 1987 SIA white paper, a 1988 article in a scientific journal, SIA testimony before Congress in 1989, a newspaper article in 2000, and a 2003 magazine or trade newspaper article. In addition, the third amended complaint alleges that NSC’s employee hazard training in the 1980’s and 1990’s did not disclose potential reproductive harm. The second category includes unspecified information SIA provided NSC “before 1982,” the SSHA journal article or articles “before 1987,” the DEC study done before 1987 that found increased risks of miscarriage, and the U.C. Davis study in the late 1980’s regarding miscarriages and fertility.

The cases we have reviewed do not involve as lengthy a delay in bringing suit as this case. For example, the plaintiff in *Nelson* brought suit six years after she used the dangerous diet drug, but only 10 months after she discovered her cause of action. (*Nelson, supra*, 142 Cal.App.4th at p. 1204.) The plaintiffs in *Unruh-Haxton* brought suit six and nine years after the first newspaper reports exposing the defendant's wrongful conduct, but within one year of discovering they had been injured. (*Unruh-Haxton, supra*, 162 Cal.App.4th at pp. 350, 352; see also *Jolly, supra*, 44 Cal.3d at pp. 1107-1109 [suit filed 9 years after the plaintiff first suspected wrongdoing and 3 years after an investigation would have established wrongful conduct]; *Norgart, supra*, 21 Cal.4th at pp. 392-393 [action filed six years after decedent's death time-barred]; *Fox, supra*, 35 Cal.4th at pp. 803-804 [complaint amended to add products liability cause of action two and one-half years after surgery but only 3 months after discovery of product defect; plaintiff entitled to rely on discovery rule].) In contrast, Megan alleges wrongful conduct prior to her birth in August 1990, which was not discovered until March 2009 (18 and one half years after she was born). And she filed suit almost 20 years after her birth.

We are not unsympathetic to NSC's concerns regarding the passage of time. The lengthy delay in filing suit has serious implications for both sides in prosecuting and defending this action. NSC's interest in repose is arguably greater after such a long period of time. But the common law has long recognized the discovery rule. (*Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1613-1614 [rule originated in the 1930's with medical malpractice and progressive occupational illness cases and has since been applied to other types of cases].) And the discovery rule is not subject to any outward time limit.

Although NSC suggests ways in which Parents could have conducted a more complete investigation, we conclude that Plaintiffs have sufficiently pleaded inability to have made an earlier discovery and that they are therefore entitled to rely on the delayed accrual of Megan's cause of action under the discovery rule. In light of our conclusion,

we do not reach NSC's contention that Plaintiffs' allegations of fraudulent concealment were not pleaded with sufficient particularity or Plaintiffs' contention that NSC is equitably estopped from relying on a statute of limitations defense.

Plaintiffs have pleaded sufficient facts to withstand demurrer as to Megan's claims. We will therefore reverse the trial court's order sustaining the demurrers to Megan's causes of action.

IV. Parents' Claims for Negligent and Intentional Infliction of Emotional Distress Are Barred by the Workers' Compensation Act

Plaintiffs contend the trial court erred when it sustained the demurrer to Parents' claims for negligent and intentional infliction of emotional distress on the ground that they were barred by the statute of limitations in section 335.1.⁹ They argue: "Because . . . [Parents] did not discover or have reason to suspect any wrongdoing in connection with Megan's injuries until . . . March 2009, they likewise did not discover or have reason to suspect any wrongdoing in connection with their own emotional distress injuries until that time. Thus, their causes of action did not accrue under the discovery rule until . . . March 2009, and this action was timely filed on February 22, 2010, . . . within the two-year limitations period of section 335.1."

NSC responds that the discovery rule does not save Parents' untimely claims and that even if the discovery rule applies, Parents' causes of action are barred by the workers' compensation exclusive remedy rule (Lab. Code, §§ 3600, subd. (a), 3601, 3602.). NSC raised the exclusive remedy argument in its demurrer to the first amended complaint.

Injuries sustained and arising out of the course of employment are generally subject to the exclusive remedy of the workers' compensation law. (*Mueller v. County of*

⁹ Although the trial court's order did not separately address Parents' emotional distress claims, NSC demurred to those claims on statute of limitations grounds, arguing that they were barred by the statute of limitations in section 335.1.

Los Angeles (2009) 176 Cal.App.4th 809, 823.) “The exclusive remedy applies even when the damages result from intentional conduct by the employer that is a normal part of employment relationships, and even though such conduct may be described as egregious, harassment, manifestly unfair, or intended to cause emotional distress.” (*Ibid.*, citing *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 15 (*Shoemaker*) and *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 159-160 [action for intentional infliction of emotional distress based on conduct normally occurring in workplace, i.e., demotions, promotions, criticism of work practices, are within exclusive jurisdiction of Workers’ Compensation Appeals Board].)

“So long as the basic conditions of compensation are otherwise satisfied (Lab. Code, § 3600), and the employer’s conduct neither contravenes fundamental public policy [citation] nor exceeds the risks inherent in the employment relationship [citation], an employee’s emotional distress injuries are subsumed under the exclusive remedy provisions of workers’ compensation.” (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754 (*Livitsanos*) [wrongful termination action alleging campaign of harassment].) The exception for conduct that “contravenes fundamental public policy” stated in *Livitsanos* is aimed at permitting a common law action for wrongful termination in violation of public policy to proceed despite the workers’ compensation exclusive remedy rule. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 809, 902.)

The exclusive remedy bar applies when an employee is injured as a result of workplace exposure to toxic substances (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 722) and even when the employer “concealed the dangers inherent in the materials the employees were required to handle [citation] or made false representations in that regard” (*Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 474). But the employee will be allowed to proceed with a civil action if the “employer acts deliberately for the purpose of injuring the employee or if the harm

resulting from the intentional misconduct consists of aggravation of an initial work-related injury.” (*Id.* at p. 476 [action not subject to exclusive remedy bar because employer aggravated employee’s asbestos-related disease by fraudulently concealing from employee and his doctors that he had the disease, which prevented him from receiving treatment and induced him to continue working under hazardous conditions].)

Plaintiffs argue that their emotional distress claims are not barred by the exclusive remedy rule. They rely on *Snyder v. Michael’s Stores, Inc.* (1997) 16 Cal.4th 991 (*Snyder*), a case in which the employer argued that the claims of a minor who was injured *in utero* when her mother was exposed to toxic carbon monoxide gas at work were barred under that rule. The issue in *Snyder* was “whether fetal injuries occurring in the mother’s workplace are remediable solely, if at all, through the workers’ compensation system.” (*Id.* at p. 996.) The court held that the derivative injury doctrine, an aspect of the exclusive remedy rule, “does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother’s injuries.” (*Id.* at p. 1000.) Since the minor in *Snyder* did not claim any damages for injury to her mother, and the complaint did not demonstrate the minor’s own recovery was legally dependent on injuries suffered by her mother, the exclusive remedy rule did not defeat the minor’s claim for her own injuries or her parents’ claim for consequential losses (increased medical, educational, and other expenses) due to the minor’s injuries. (*Ibid.*)

Parents argue that their emotional distress claims are like the parents’ consequential damages claims in *Snyder* that were not barred by the exclusive remedy rule. They contend, “There is no principled reason, however, to distinguish between economic and non-economic damages, where the employee’s injury is predicated on the injury to the child. If the child’s claim is not barred by [the exclusive remedy rule], then neither should a claim by the employee parent for injury arising out the child’s injury, whether that claim seeks economic or non-economic damages or both.” Parents assert

further that the mother in *Snyder* “had herself suffered physical injury as a result of the employer’s alleged negligence” and there was no indication that the mother’s emotional distress claim “was premised on anything other than her own physical injury arising ‘directly from [her] employment,’ as opposed to the injuries suffered by her child after she was born.” Parents contend their emotional distress claims are not barred because they arise out of the injuries suffered by Megan.

We conclude that the distinction between emotional injuries due to Parents’ own exposure to hazardous chemicals versus emotional injuries based on Megan’s injuries does not preclude application of the exclusive remedy rule. Both are allegedly due to workplace exposure to hazardous chemicals. And this case is not distinguishable from *Snyder* merely because Parents did not suffer physical injuries. An employee’s claim for intentional or negligent emotional distress is not outside the workers’ compensation law, notwithstanding the absence of any physical injury. (*Livitsanos, supra*, 2 Cal.4th at pp. 749-756.)

Parents do not allege facts that take them outside the exclusive remedy bar. They do not allege that NSC acted deliberately for purpose of injuring them, or that NSC’s conduct aggravated an initial work-related injury (*Johns-Manville, supra*, 27 Cal.3d at p. 474). Nor do they allege wrongful termination or conduct that exceeds the risks inherent in the employment relationship (*Livitsanos, supra*, 2 Cal.4th at p. 754).

We hold that Parents’ sixth and seventh causes of action for intentional and negligent infliction of emotional distress are barred by the exclusive remedy rule. And since Parents do not suggest any manner in which their complaint can be amended to avoid the exclusive remedy bar, we conclude that the demurrer to these causes of action should be sustained without leave to amend.

DISPOSITION

The judgment of dismissal is reversed. The cause is remanded to the superior court with directions to vacate its order sustaining the demurrers without leave to amend and to enter a new order (1) overruling the demurrers to Megan's first through fifth causes of action; and (2) sustaining the demurrers to Parents' sixth cause of action for negligent infliction of emotional distress and their seventh cause of action for intentional infliction of emotional distress without leave to amend. The parties shall bear their own costs on appeal.

Márquez, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Grover, J.